Lo Ga Lung v Diong Ching Diung

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO Q-02–2816–11 OF 2011
AZAHAR MOHAMED, DAVID WONG AND ABANG ISKANDAR JJCA
25 APRIL 2014

Contract — Void contract — Moneylending — Whether failure of documents of debt securing loan to comply with ss 3 and 4 of the Moneylenders Ordinance (Cap 114) rendered them void — Whether non-compliance with s 3 of the Ordinance only resulted in debt documents being inadmissible as evidence in court — Whether Ordinance required documents of debt to be prepared before appropriate officer of the court who also had to witness lender handing over loan monies to borrower — Whether practising advocate and solicitor was not 'officer of the court' for purposes of ss 3 and 4 of the Ordinance

The appellant, a licensed moneylender, had lent monies to the respondent against the security of three charges ('the debt documents') on the respondent's lands. The signatures on the charge documents were attested by an advocate and solicitor ('Teo Chong Lee'). Twenty years later, the respondent, who had never repaid any part of the loan nor paid any interest thereon, applied to the High Court to declare the debt documents null and void for being in breach of ss 3 and 4 of the Moneylenders Ordinance (Cap 114) ('the Ordinance') and for an order that his land titles be returned to him. Section 3(1) of the Ordinance stipulated that 'every document of debt of whatsoever nature entered into with a registered moneylender shall be made out and registered in court, and any such document not complying with this Ordinance shall not be accepted as evidence in court'. Section 4 stated, inter alia, that 'At the time a document of debt is signed by the borrower, the officer attesting such document shall, if a cash loan, see that the full amount set forth therein is paid over in his presence by the lender to the borrower …'. It was held in *Phuman Singh v Kho Kwang Choon* [1965] 2 MLJ 189 that the Ordinance required the actual debt documents to be prepared before the appropriate officer of the court and that while non-compliance with s 3 rendered the debt documents inadmissible as evidence in court, it did not render the money-lending transaction itself unenforceable. The respondent's argument was that Teo Chong Lee was not an 'officer of the court' for the purposes of s 3 of the Ordinance and that since the appropriate 'officer of the court' did not witness the appellant handing over the loan monies to the respondent, s 4 of the Ordinance had also been breached. In response to the respondent's application, the appellant had asked the court, in the event it held the debt documents to be void, to order the respondent to refund the loan sum with interest pursuant to s 66 of the Contracts Act 1950 as the respondent had had full use of the monies without having paid any

interest thereon. The High Court allowed the respondent's application but did not make any order for restitution in favour of the appellant.

Held, allowing the appeal and setting aside the decision of the High Court with costs of RM20,000:

(1) The High Court had misconstrued s 3 of the Ordinance in holding that non-compliance with the section had the effect of rendering the documents of debt void when in fact it only had the limited effect of prohibiting the admissibility of those documents as evidence in court. By declaring the debt documents void, the High Court had exceeded the boundary s 3 had in fact and in law conferred (see para 14).

(2) The issue of restitution under s 66 of the Contracts Act 1950 ceased to be a live issue as the question of the debt documents being 'void' did not arise (see para 17).

(3) The High Court was right to hold there had been non-compliance with ss 3 and 4 of the Ordinance in the sense the debt documents were not attested by an 'officer of the court' and that the handing over of the loan monies from the appellant to the respondent was not witnessed by such an officer. The High Court was right in ruling that the phrase 'officer of the court' would not include a practising advocate and solicitor such as Teo Chong Lee. The phrase referred to the functionaries or officers in the employment of the court registry and the like. Teo Chong Lee could not be considered an 'officer of the court' for the purpose of fulfilling the dictates of the Ordinance in relation to the 'making out' and preparation of the debt documents. He might well fall within the phrase 'officer of the court' in other legislations but he was never an officer of the court within the specific purview of the Moneylenders Ordinance (Cap 114) (see para 7).

[Bahasa Malaysia summary

Perayu, pemberi pinjaman wang berlesen, telah meminjamkan wang kepada responden terhadap jaminan tiga gadaian ('dokumen hutang') ke atas tanah responden. Tandatangan pada dokumen gadaian telah disahkan oleh seorang peguambela dan peguamcara ('Teo Chong Lee'). Dua puluh tahun kemudian, responden yang tidak pernah membayar semula mana-mana bahagian pinjaman berserta apa-apa faedah ke atasnya, memohon kepada Mahkamah Tinggi untuk mengisytiharkan dokumen hutang terbatal dan tidak sah kerana melanggar ss 3 dan 4 Moneylenders Ordinance (Cap 114) ('Ordinan') dan untuk mendapatkan perintah supaya hakmilik tanah itu dikembalikan kepadanya. Seksyen 3(1) Ordinan itu menetapkan bahawa 'every document of debt of whatsoever nature entered into with a registered moneylender shall be made out and registered in court, and any such document not complying with this Ordinance shall not be accepted as evidence in court'. Seksyen 4

menyatakan, antara lain, bahawa 'At the time a document of debt is signed by the borrower, the officer attesting such document shall, if a cash loan, see that the full amount set forth therein is paid over in his presence by the lender to the borrower ...'. Ia telah diputuskan di dalam *Phuman Singh v Kho Kwang Choon* [1965] 2 MLJ 189 bahawa Ordinan mengkehendaki dokumen hutang sebenar disediakan di hadapan pegawai mahkamah yang berkenaan dan walaupun tidak mematuhi s 3 menjadikan dokumen hutang tidak boleh diterima sebagai keterangan di mahkamah, ia tidak menyebabkan transaksi pinjaman wang itu sendiri tidak boleh dikuatkuasakan. Hujah responden adalah Teo Chong Lee bukan seorang 'officer of the court' bagi maksud s 3 Ordinan dan memandangkan 'officer of the court' yang berkenaan tidak menyaksikan penyerahan perayu berkaitan wang pinjaman kepada responden, s 4 Ordinan itu juga telah dilanggar. Dalam balasan kepada permohonan responden, perayu telah memohon mahkamah, sekiranya mahkamah memutuskan dokumen hutang adalah tidak sah, untuk memerintahkan responden membayar balik jumlah pinjaman dengan faedah menurut s 66 Akta Kontrak 1950 kerana responden telah menggunakan sepenuhnya wang tanpa membayar apa-apa faedah atasnya. Mahkamah Tinggi membenarkan permohonan responden tetapi tidak membuat apa-apa perintah bagi pengembalian memihak kepada perayu.

Diputuskan, membenarkan rayuan dan mengetepikan keputusan Mahkamah Tinggi dengan kos sebanyak RM20,000:

(1) Mahkamah Tinggi telah tersalah tafsir s 3 Ordinan dalam memutuskan bahawa ketidakpatuhan terhadap seksyen itu mempunyai kesan menyebabkan semua dokumen hutang tidak sah apabila sebenarnya ia hanya mempunyai kesan terhad yang melarang kebolehterimaan dokumen-dokumen sebagai bukti di mahkamah. Dengan mengisytiharkan dokumen hutang tidak sah, Mahkamah Tinggi telah melampaui had s 3 pada hakikatnya dan dalam undang-undang yang diperuntukkan (lihat perenggan 14).

(2) Isu pengembalian di bawah s 66 Akta Kontrak 1950 tidak lagi menjadi isu secara langsung kerana persoalan dokumen hutang yang 'tidak sah' tidak timbul (lihat perenggan 17).

(3) Mahkamah Tinggi adalah betul dalam memutuskan terdapat ketidakpatuhan dengan ss 3 dan 4 Ordinan dalam erti dokumen hutang tidak dibuktikan oleh satu 'officer of the court' dan penyerahan wang pinjaman daripada perayu kepada responden tidak disaksikan oleh pegawai sedemikian. Mahkamah Tinggi adalah betul dalam memutuskan bahawa frasa 'officer of the court' tidak termasuk peguambela dan peguamcara yang menjalankan amalan seperti Teo Chong Lee. Ungkapan merujuk kepada petugas atau pegawai yang sedang berkhidmat dengan pejabat pendaftar mahkamah dan

sebagainya. Teo Chong Lee tidak boleh dianggap sebagai 'officer of the court' bagi maksud memenuhi perintah Ordinan yang berhubungan dengan 'making out' dan penyediaan dokumen hutang. Dia juga mungkin termasuk dalam frasa 'officer of the court' dalam undang-undang lain tetapi dia tidak pernah menjadi pegawai mahkamah dalam bidang tugas khusus Moneylenders Ordinance (Cap 114) (lihat perenggan 7).]

Notes

For a case on moneylending, see 3(3) *Mallal's Digest* (4th Ed, 2013 Reissue) para 6919.

Cases referred to

Karpal Singh v Atip bin Ali [1987] 1 MLJ 291, SC (distd)
Phuman Singh v Kho Kwang Choon [1965] 2 MLJ 189, FC (folld)
Raja Segaran a/l Krishnan v Bar Council Malaysia & Ors [2000] 1 MLJ 1, HC (distd)

Legislation referred to

Contracts Act 1950 s 66
Moneylenders Ordinance (Cap 114) ss 3, 4
Sarawak Land Code (Cap 81)

Appeal from: Originating Summons No Sb-24–4 of 2011 (High Court, Sibu)

George Lim (Battenberg & Talma Advocates) for the appellant.
Augustine Liom (Tang & Co) for the respondent.

Abang Iskandar JCA (delivering judgment of the court):

[1] This has been an appeal emanating from the High Court sitting in Sibu, Sarawak. It concerned an originating summons ('the OS') filed by the respondent ('borrower') who had sought a declaration from the High Court that the debt documents that were generated with regard to the moneylending transactions between him and the appellant ('lender') be declared as null and void and that the land titles belonging to him, that were used to secure the borrowings be returned back to him. Suffice to state here that certain specific provisions as contained in the Moneylenders Ordinance (Cap 114) were cited in support of the borrower's OS.

[2] The learned trial judge, having heard and considered the OS had granted the prayers in terms as prayed for by the respondent. The aggrieved lender had since filed an appeal against that order by the learned trial judge. Hence that had accounted for the hearing of this appeal before us. We had occasion to hear

A the appeal and had considered the submissions put forth by both learned counsel. Having done that, we had allowed the appeal by the moneylender appellant. We now proffer our reasons for so deciding in his favour.

B **[3]** To begin, a brief look at the facts would be useful. It would appear that the impugned transactions had taken place many years ago. In fact they were affected in last century, back in 1990/1991 to be exact. The transactions, as were shown in the debt documents, were attested by one Teo Chong Lee esquire, advocate and solicitor, having his legal practice in Sibu, Sarawak at the material time. Nothing seemed to be amiss during that time. The sum of money concerned in the transactions to which the documents of debts related, had indeed changed hands from the appellant to the respondent. This factual circumstance was not disputed between the parties. Everything went on fine, until one day after 20 years down the road, the respondent borrower had run to the Sibu High Court with his OS seeking for the above-stated prayers. A look at the OS had shown that the respondent was now challenging the propriety of the debt documents on the ground that the said documents had run afoul of ss 3 and 4 of the Moneylenders Ordinance (Cap 114). Sections 3 and 4 of the Moneylenders Ordinance are now reproduced as below:

C

D

E Section 3

(1) Every document of debt of whatsoever nature entered into with a registered Moneylender shall be made out and registered in court, and any such document not complying with this Ordinance shall not be accepted as evidence in court.

F

(2) No unregistered moneylender shall make out a document of debt in court.

Section 4

G At the time a document of debt, is signed by the borrower, the officer attesting such document shall, if a cash loan, see that the full amount set forth therein is paid over in his presence by the lender to the borrower or, if the consideration be other than cash, satisfy himself that the borrower has received full value for the amount set forth in the document.

H **[4]** The ambit of s 3 of the Moneylenders Ordinance had been discussed in the case of *Phuman Singh v Kho Kwang Choon* [1965] 2 MLJ 189 ('the *Phuman Singh*'s case') and it was there held by Wylie CJ (Borneo) that it would appear that the preparation of the debt documents in the context of it being 'made out' must refer to the actual preparation of the said documents and not merely its execution. The learned Chief Justice then went on to state that the Ordinance 'does require the actual document to be prepared before the appropriate officer of the court'. As such, the preparation of the documents must be done or 'made out' in court by the appropriate 'officer of the court'.

I

[5] On the facts of this immediate case before us, the fact that the debt documents now under scrutiny was not made out in court was not disputed. A

[6] The other alleged breach against s 3 was because the said Teo Chong Lee, though a lawyer, was not an 'officer of the court. The alleged breach against s 4 was because the transfer of the physical money from the lender to the respondent was not witnessed by a court official as stipulated therein. B

[7] We had heard and considered the submissions placed before us in the course of the appeal and having considered the same, we noted that both learned counsel had appropriately referred us to the case *Phuman Singh v Kho Kwang Choon* [1965] 2 MLJ 189 (the *Phuman Singh*'s case). At the outset, from the consideration of the materials placed before the trial judge, we were of the view that she had not erred when she found that there had been non-compliances of ss 3 and 4 of the Moneylenders Ordinance in the sense that the debt documents were not attested by an 'officer of the court' and that the handing over of the money from the lender to the borrower was not witnessed by an 'officer of the court' as well, as was contemplated under s 4 therein. With regard to the 'officer of the court' issue, there was an attempt by Mr George Lim, learned counsel for the appellant lender, who contended that a practising advocate and solicitor could qualify as an 'officer of the court' for the purpose of fulfilling the dictates of relevant provisions of the sections under review. We are of the view that the case of *Raja Segaran a/l Krishnan v Bar Council Malaysia & Ors* [2000] 1 MLJ 1 could not be used as an authority for the proposition that was being advanced before here by learned counsel for the lender. In the *Raja Segaran*'s case the phrase that was being scrutinised by the court there had been 'officer of the Court' as was the case in the Supreme Court case of *Karpal Singh v Atip bin Ali* [1987] 1 MLJ 291 where counsel's conduct in court was under the supervision of the court before whom he was appearing when conducting a court proceeding. In the scheme of things, the learned trial judge was correct when she had ruled that the phrase 'officer of the court' referred to by Chief Judge Wylie (Borneo) in the *Phuman Singh*'s case would not include a practising advocate and solicitor such as Mr Teo Chong Lee. The phrase refers to the functionaries or officers in the employment of the court registry and the like. Mr Teo Chong Lee, being a practising advocate at the material times, was not one such person who could, by any stretch of imagination, be considered as such 'officer of the court' for the purpose of fulfilling the dictates of the Moneylenders Ordinance relating to the making out and preparation of the debt documents. He may well fall within the phase 'officer of the court' in other legislation, but he was never an officer of the court within the specific purview of the Moneylenders Ordinance (Cap 114). On the facts as well, the transfer of the money involved in the transaction to which the debt documents related was not witnessed by the officer of the court upon its execution. Based on that premise, there had been instances of non-compliance by the appellant lender C D E F G H I

A and the learned trial judge was correct in concluding as she did on those issues as raised before her.

[8] But having said that, the next question that begged an answer was whether such non-compliances by the lender with regard to the three debt documents would render them null and void by virtue of ss 3 and 4 of the Moneylenders Ordinance (Cap 114).

[9] To our mind, this *Phuman Singh*'s case had stated the position of the law on the meaning and intent of ss 3 and 4 of the Moneylenders Ordinance, quite clearly. From a perusal of the decision in the *Phuman Singh*'s case in particular, the speech of Wylie CJ (Borneo), two things had been clear in relation to the licensed money-lending activities. One has been that the respective positions of the Sarawak Land Code and the Moneylenders Ordinance, seen in their in proper context. We reproduce below the relevant excerpt of His Lordship Wylie's speech that is found at p 194B–E of the report below, for ease of convenience:

> The relevant part of the Land Code provides for a system of registration of land based on the Torrens system and the object is to establish and maintain an up-to-date register of land ownership and dealings with special emphasis on the fact that the register is paramount in regard to interests in land. Consequently, once a person is registered as proprietor of an interest in land (be he a registered moneylender or not) he is in a very strong position in regard to that interest.
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> The object of the Moneylenders Ordinance is to control the dealings of moneylenders with special emphasis on protection of the borrower in regard to transactions that may be considered harsh or unconscionable. There is no conflict between the objects of the two sets of legislation, but there is nothing in the Land Code, which would tend to control the activities of moneylenders, especially in the manner envisaged in ss 3 and 4 of the Ordinance.

[10] On the facts of the present case, there was no evidence that the appellant had applied for foreclosure proceedings. It was the respondent who had run to the High Court, 20 years after the debts documents (comprising the three relevant charge documents as security for the loan amounts) were registered with the Lands and Surveys Office in Sibu, alleging that the same debt documents were not 'made out in court'. That had accounted for his OS that had sought the High Court in Sibu to declare the said documents to be void because they were not made out in court, relying on ss 3 and 4 of the Moneylenders Ordinance (Sarawak). Part of the admitted facts had shown that the respondent had received the monies from the appellant under the now impugned documents to the fullest and had not repaid to the appellant lender, a single cent.

[11] To recap, the learned trial judge had agreed with Mr Augustine Liom,

learned counsel for the respondent on the ground that as the debt documents were not made in compliance with the said ss 3 and 4 of the Moneylenders Ordinance. As such, in her penultimate order, they were thus invalid and could not be relied upon to foreclose the land and that as such, 'there was nothing to hold on to the land which was registered in the Land Office. The defective documents of debts were void ab initio. Hence void ab initio'. She then had gone on to declare the debt documents as void and ordered the appellant to return the document of titles respecting the said land to the respondent, as can be seen at p 21 of the record of appeal (Part A, Part B and Part C).

[12] At this juncture, it would be pertinent to refer to the other portion of Wylie CJ's speech in the *Phuman Singh*'s case at p 194A–E in the report and which reads like so:

> In the present instance there was no compliance with ss 3 and 4 of the Ordinance. Section 3 could not be complied with by means of the late registration that was affected, because by that time it was impossible to have the document of debt prepared before an officer of the Court. In consequence, these charges may not be 'accepted as evidence in Court', to quote the language of s 3 of the Ordinance.
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> To determine the effect of this prohibition, some consideration must be given to its precise meaning. *The Ordinance nowhere declares a money lending contract to be unenforceable as provided for in some sections of the Moneylenders Ordinance, 1951, of Malaya, although s 5 does provide for relief and taking of account, if a transaction is considered by a Court to be harsh and unconscionable*. As already observed, much comment could be passed on the unusual language of the Ordinance, and, in consequence of this unusual language, little assistance in interpreting it can be obtained from any authorities. I have already referred to the objects of this legislation. These would justify an interpretation wide enough to secure these objects, *but I find difficulty in giving any extended meaning to this language, because I cannot find in the Ordinance itself anything which would assist me in determining the limits to give to an extended meaning*. Consequently, the only principle I feel justified in applying is the basic principle that language used in an enactment should be given its ordinary meaning in the absence of any ambiguity or difficulty in following that course. I see nothing ambiguous in this expression and no difficulty in applying it in the present proceedings, although the provision may be unusual when compared with similar legislation elsewhere. *In my judgment, the only effect is that the document of debt is not to be admitted as evidence, and the section has no other direct effect on the transaction. Consequently, the contract remains enforceable, if this can be affected without having to produce the document of debt*. (Emphasis added.)

[13] On the facts of the case before Their Lordships in the *Phuman Singh*'s case, Wylie CJ (Borneo), with whom learned justice Tan Ah Tah FJ had also agreed, had concluded as follows: 'Consequently, the prohibition on the acceptance of the charges as evidence in court effectively prevents this application (by the lender) from succeeding in the state of the *evidence in these proceedings*'(Emphasis added.)It is clearly to be noted that the prohibitory

effect only relates to the *admissibility of the impugned documents themselves as evidence and it does not extend to justifying the court to proceed to declare* the said documents as being void for any other purpose. Indeed, the contract remains enforceable, if this can be affected without having to produce the documents of debt.

[14] As such, we were in agreement with learned counsel for the appellant that the learned trial judge had misconstrued s 3 of the Moneylenders Ordinance to the extent that it had the effect of rendering the documents of debt as void when in fact, that s 3 only had the limited effect of prohibiting admissibility of the impugned debt documents as evidence in court. By so doing she had exceeded the boundary which s 3 had in fact and in law conferred upon her. We agreed with Mr George Lim, that on that score alone, this appeal ought to succeed and we had so held.

[15] There was the other issue that had pertained to s 66 of the Contracts Act 1950. The lender appellant had, via his affidavit in opposition to the borrower respondent's OS for the declaratory orders, applied to the High Court to invoke its discretion to make an order of restitution under s 66 Contracts Act 1950 in favour of the lender because to the respondent had been unjustly enriched at the lender's expense, in the circumstances of this case. The learned trial judge had dealt with the matter in this manner, under the miscellaneous issues, as follows:

> Miscellaneous Issues
>
> 13 Mr Lim contended that the Plaintiff had for the past twenty years enjoyed the full use of the money and does not even pay the interest promised. It was submitted that if the document of debts are declared void, the court can order the Plaintiff to refund the loan money with interest under section 66 of the Contract Act 1950 since the Plaintiff has received the full advantage under the void document.
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> 14 Suffice it to say that there was no application by the Defendant for recovery of the loan money. The issue on application of section 66 is not within the purview and ambit of this application. Thus, not much need be said on the applicability of this section to the present action.

[16] It is clear to our mind that the issue on s 66 was one that was predicated on the supposition that it ought to be addressed by the trial judge only if the debt documents were declared as void. But she had not made that the order that was sought by the appellant lender because 'the application of s 66 is not within the purview and ambit of this application (being the OS)'.

[17] Be that as it may, since we had allowed the appellant's appeal against the learned trial judge's order that had declared the documents of debt as being null and void, we therefore are of the considered and respectful view that there does

not exist now the fundamental substratum for the application of s 66 of the Contracts Act 1950, namely there is no 'void documents' within the contemplation of that provision, in relation to the debt documents. As such, the issue of s 66 of the Contracts Act 1950 did not feature as a live issue before us for our due consideration, one way or another. The way we saw it, as we had earlier indicated, this ground on restitution under s 66 of the Contracts Act 1950 could only be pursued by the appellant in the alternative in the circumstances. With respect, the appellant cannot have it both ways. In the circumstances, having made the above observation, we made no order on the issue of restitution under s 66 of the Contracts Act 1950.

[18] In the upshot, this appeal was allowed by us and the orders made by the learned trial judge allowing the prayers in the respondent's OS were set aside. We had awarded costs to the appellant here and below in the sum of RM20,000. We had further ordered the deposit to be refunded to the appellant.

Appeal allowed and decision of the High Court set aside with costs of RM20,000.

Reported by Ashok Kumar